Supreme Court, U. S.
FILED
SEP 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1627

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

v.

LEON NEWSOME,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STANLEY NEUSTADTER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Criminal Appeals Bureau
119 Fifth Avenue
New York, New York 10003
Tel: [212] 677-4224

Attorneys for Respondent

WASHINGTON, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
THE STATE, BY SANCTIONING APPELLATE REVIEW OF PRE-PLEA LITIGATION OF CONSTITUTIONAL CLAIMS, ABANDONED ITS EXPECTATION THAT RESPONDENT'S GUILTY PLEA INVESTED A FINALITY TO THAT LITIGATION; RESPONDENT, WHOSE GUILTY PLEA "WAIVED" ONLY HIS STATE-COURT TRIAL, AVAILED HIMSELF OF THE STATE-APPROVED PROCEDURES TO FULLY EXHAUST STATE REMEDIES, AND THUS PROPERLY PRESERVED HIS CONSTITUTIONAL CLAIM FOR THE HABEAS CORPUS RELIEF GRANTED BELOW	9
CONCLUSION	25

TABLE OF AUTHORITIES

Cases:

Blackledge v. Perry, ___ U.S. ___, 40 L. Ed. 2d 628 (#72-1660)	18
Fay v. Noia, 372 U.S. 391 (1963)	19, 21, 23
Henry v. Mississippi, 375 U.S. 443 (1965)	7
Hensley v. Municipal Court, 411 U.S. 345 (1973)	6
Lawn v. United States, 355 U.S. 339 (1955)	10

Page

Mann v. Smith, 488 F.2d 245 (9 Cir. 1973) cert. den. 415 U.S. 932 (1974) 23

Mapp v. Ohio, 367 U.S. 643 (1960) 7

McMann v. Richardson, 397 U.S. 757 (1970) 7, 15, 16, 17, 18

Neil v. Biggers, 409 U.S. 188 (1972) 24

Newsome v. New York, 405 U.S. 908 (1972) 5

North Carolina v. Pearce, 395 U.S. 711 (1969) 13

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1960) 23

Parker v. North Carolina, 397 U.S. 790 (1970) 24

People v. Friola, 11 N.Y.2d 157 (1962) 10

People v. Gibbs, 21 A.D.2d 980 (2d Dept. 1963) 10

People v. Lakin, 21 A.D.2d 902 (2d Dept. 1965) 13

People v. Nicholson, 11 N.Y.2d 1067 (1962) 16

People v. Stokes, 32 N.Y.2d 202 (1973) 13

People v. Torres, 45 A.D.2d 185 (1 Dept. 1974) 13

Raley v. Ohio, 360 U.S. 423 (1959) 22

Ross v. Moffitt, ___ U.S. ___, 41 L.Ed. 2d 341 (#73-786) 24

Santobello v. New York, 404 U.S. 257 (1971) 22

Sheppard v. Ohio, 353 U.S. 910 (1956) 23

Sibron v. New York, 392 U.S. 40 (1968) 24

State ex rel. Lawrence v. Henderson, 433 SW2d 96 (Tenn. Cr. App. 1968) 15

Tollett v. Henderson, 411 U.S. 258 (1973) 7, 15, 16, 17, 18

United States v. Clark, 459 F.2d 977 (8 Cir. 1972) 10, 23

United States v. Cox, 464 F.2d 937 (6 Cir. 1972) 23

United States v. DeCosta, 435 F.2d 630 (1 Cir. 1970) 23

United States v. Doyle, 348 F.2d 715 (2 Cir. 1965) 23

Page

United States v. Mendoza, 491 F.2d 534 (5 Cir. 1974) 23

United States ex rel. Molloy v. Follette, 391 F.2d 231 (2d Cir. 1968) 20

United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974) 6

United States ex rel. Rogers v. Warden, 381 F.2d 209 (2d Cir. 1967) 20

Statutes:

28 U.S.C. §1257(3) 23

28 U.S.C. §2244(c) 24

28 U.S.C. §2254 ..... 6, 8

Fed. Rule Crim. Proc. 41(3) 10

United States Supreme Court Rule 19 23

California Penal Code §1538.5(m) 12

Indiana Code of Criminal Procedure §35-2.1-4-5(2)(e) [Proposed Final Draft, Sept. 1972] 12

New York Code of Criminal Procedure

§813-c ..... *passim*

§813-d(1) 10

§813-d(2) 10

§813-d(4) 10

New York Criminal Procedure Law (eff. Sept. 1, 1971) §710.70(2) 12

Wisconsin Statutes Annotated §971.31(10) 11

Miscellaneous:

American Bar Association MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO CRIMINAL APPEALS §1.3(b)(i) [Approved Draft: 1970] 11

1970 Wisconsin Annotations 2142 11

UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 444(d) [Approved Draft: August, 1974] 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1627

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Petitioner,

v.

LEON NEWSOME,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals is reported at 492 F.2d 1166, and is included in the Appendix at pp. 19a-34a; the memorandum of the District Court for the Eastern District of New York has not been reported and appears in the Appendix at pp. 17a-18a.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1974. The petition for a writ of certiorari was filed on April 29, 1974, and was granted on June 17, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a state defendant's plea of guilty waive federal habeas corpus review of his conviction, even though under state law, he has been permitted review in the state appellate courts of the denial of his motion, on constitutional grounds, to suppress the evidence that would have been offered against him had there been a trial?

STATUTE INVOLVED

New York Code of Criminal Procedure §813-c provides:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

> If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

McKinney's Consolidated Laws of New York, Book 66, Part 3 page 78 (Supp. 1970).

STATEMENT

State Court Proceedings

This case evolved from respondent's arrest for loitering (N. Y. Penal Law §240.35[6]) in the lobby of a City Housing Authority apartment house at 10:20 p.m. on the chilly evening of February 12, 1970. A search incident to this arrest resulted in the seizure of a small quantity of heroin and several hypodermic instruments, upon which added charges (N.Y. Penal Law §§220.05, 220.45) were predicated. Respondent moved to suppress the evidence on the grounds that it was seized incident to an unlawful arrest; on April 7, 1970, a hearing on the motion to suppress was joined with the trial on the loitering charge.

The arresting officer testified that he had received a telephone complaint "from an anonymous female to the effect someone was in the hallway" at an address in

Queens (4).[1] Proceeding to the address given, the officer observed respondent standing with another person in the lobby (4). The officer immediately (within 20 seconds, he estimated [7]) asked respondent what he was doing there, to which respondent replied: "I am not doing anything" (5), further explaining that he had just arrived (6).[2] Respondent then was asked for identification, and when he was unable to produce any, he was arrested for loitering (N.Y. Penal Law §240.35[6]) and searched incident to that arrest (6). Respondent's companion was not arrested.

Counsel argued that the evidence was insufficient to support a loitering conviction; that respondent's arrest for loitering was unreasonable in that there can be no probable cause to arrest for loitering a citizen who was observed simply standing for 20 seconds in the lobby of a multiple dwelling; and that the statute pursuant to which respondent was arrested was unconstitutional. The court rejected these arguments (12, 13, 21).

Respondent was found guilty of loitering as charged and the court denied the motion to suppress the evidence which was seized during the search incidental to the loitering arrest.

---

[1] References in parentheses are to minutes of hearing and trial dated April 7, 1970, which shall be made available to the Court upon request. The minutes of plea and sentence, dated May 7, 1970 have been included in the Appendix (13a-17a).

[2] The officer did not recall petitioner telling him that he had entered the lobby to get out of the cold (7). National Weather Service records indicate that temperature readings of 31° were taken in Central Park at both 10 and 11 p.m. on the night of the arrest, which occurred at 10:20 p.m.

On May 7, 1970, respondent pleaded guilty to attempted possession of drugs (N.Y. Penal Law §220.15, 110.00) to cover the possessory charges. He was sentenced to an unconditional discharge on the loitering conviction and to a 90-day term for the possession conviction.

The arguments raised by trial counsel at the trial and hearing were raised on appeal to the Appellate Term. That court reversed the loitering conviction, but held that there was probable cause to arrest for loitering, affirming the order denying the motion to suppress.

Leave to appeal to the New York Court of Appeals was denied on July 14, 1971, by Associate Judge Breitel.

This Court denied a petition for a writ of certiorari on February 22, 1972 (405 U.S. 908 *sub. nom. Newsome v. New York*).

Federal Court Proceedings

On April 6, 1972, respondent filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of New York (72 Civ. 453). The petition reiterated the claim, previously raised in state court, that the arrest under the color of the loitering statute, allegedly an unconstitutional enactment, was invalid and the evidence seized incident thereto should therefore have been suppressed.

The district court (Bruchhausen, J.) dismissed the petition on jurisdictional grounds in an unreported memorandum and order dated May 23, 1972 which held that petitioner was not "in custody" for federal habeas corpus purposes (App. 18a).

The court of appeals granted a certificate of probable cause, appointed counsel, and issued a stay of

proceedings on July 5, 1972. Though briefs were timely filed, the matter was held in abeyance pending this Court's determination of the "custody" issue, which was eventually resolved by *Hensley v. Municipal Court* (411 U.S. 345 [1973]). Accordingly, the panel summarily remanded the matter on April 26, 1973 to the district court for a determination of the merits. Upon the remand Judge Bruchhausen granted the writ; petitioner's appeal to the court of appeals resulted in an affirmance on January 28, 1974 (492 F.2d 1166) [App. 19a-34a].

Petitioner then sought certiorari on two issues, including the substantive issue upon which habeas relief had been granted. On June 17, 1974, this Court granted the writ, but specifically limited the grant to the procedural question presented, as set forth above at p. 2.

SUMMARY OF ARGUMENT

Petitioner, having conceded throughout that respondent's federal constitutional claim was fully and properly litigated in timely accord with New York's statutory procedures [N.Y.C.C.P. §813-c], asserts that respondent's guilty plea *ipso facto* "waived" the habeas corpus relief which Congress has made available as a matter of right to any claimant who, like respondent, has duly exhausted state remedies [28 U.S.C. §2254]. This assertion was rejected below, the court correctly concluding that granting the writ would "intrude less into local administration of criminal justice than if we

were to adopt the contrary course suggested by [petitioner]" [App. 20a]

The states, of course, are free to devise procedural methods [*Mapp v. Ohio*, 367 U.S. 643, 659 n. 9 (1960)], such as §813-c, for litigating federal constitutional claims; and federal courts have always been advised to accord substantial deference to the integrity of any state procedural device which reflects a legitimate state interest. *Henry v. Mississippi*, 375 U.S. 443 (1965). New York has found it preferable to allow an appeal following a guilty plea rather than have a defendant waste everyone's time lest he suffer appellate forfeit of the only issue of any significance to prosecution and defense: the constitutional admissibility of evidence. In furtherance of this preference the New York legislature has preserved for post-plea appellate review an order denying a motion to suppress. By equating a plea with a "waiver", however, petitioner ignores the operative effects of §813-c upon the litigants–defense and prosecution–who proceed under its terms.

More important, petitioner's assertion of "waiver" is inconsistent with the rationale underlying such plea-related habeas cases as *McMann v. Richardson*, (397 U.S. 759) and *Tollett v. Henderson*, (411 U.S. 258): the state has a justifiable expectation that finality has attached to criminal proceedings predicated upon a counselled plea of guilty where no issues, other than the constitutional validity of the plea itself, are thereafter cognizable in state court. By denying federal court access to those who have so pleaded and by insulating such convictions against federal habeas corpus

attack, this Court's plea cases, utilizing the legal construct of "waiver", legitimized and protected the states' expectations of finality because reasonable state procedural rules (and the counselled defendants' failure to avail themselves of them) made those expectations *justifiable*.

Implicit in this Court's plea cases, however, is the corollary that where the state does *not* have a justifiable expectation of finality, the habeas corpus statute requires the doors of federal court to remain open for vindication of properly preserved and exhausted federal constitutional claims. In light of the enactment of §813-c, New York's expectation of finality is no more justifiable following a plea than following a trial; by enacting the statute, the state has chosen to divest itself of a justifiable expectation of finality where, as here, those statutory procedures have been followed and the constitutional claim litigated under its alluring aegis. In terms of the availability of habeas corpus relief, respondent's plea is, in a word, irrelevant; it "waived" only his state-court trial. The only "waiver" in this case is New York's: its voluntary and counselled enactment of §813-c has relinquished its prerogative to claim that respondent's guilty plea terminated litigation of his constitutional claim.

On the other hand, respondent, who followed state procedures, obviously cannot be said either to have deliberately bypassed them or to have relinquished the constitutional rights the state's procedures were designed to vindicate expeditiously. To rule otherwise would undermine state legislative policy, subvert the exhaustion requirement of §2254 by making resort to

sanctioned state procedures a trap, and, on this record, unfairly penalize respondent for his explicit and well-founded reliance upon §813-c as a method, approved since 1962 by the state and since 1967 by the Second Circuit, for litigating and preserving his federal claim for habeas corpus review.

ARGUMENT

THE STATE, BY SANCTIONING APPELLATE REVIEW OF PRE-PLEA LITIGATION OF CONSTITUTIONAL CLAIMS, ABANDONED ITS EXPECTATION THAT RESPONDENT'S GUILTY PLEA INVESTED A FINALITY TO THAT LITIGATION; RESPONDENT, WHOSE GUILTY PLEA "WAIVED" ONLY HIS STATE-COURT TRIAL, AVAILED HIMSELF OF THE STATE-APPROVED PROCEDURES TO FULLY EXHAUST STATE REMEDIES, AND THUS PROPERLY PRESERVED HIS CONSTITUTIONAL CLAIM FOR THE HABEAS CORPUS RELIEF GRANTED BELOW.

I.

In most jurisdictions, the only way to preserve a Fourth Amendment claim for state appellate review is to go to trial, interpose an objection to the constitutional admissibility of the evidence, and pursue an appeal. In such jurisdictions, a guilty plea either forfeits the issue or leaves it unlitigated and thus, under state procedural rules, precludes subsequent state

appellate review of any Fourth Amendment claim the defendant might otherwise have been able to pursue on appeal had he chosen to go to trial. Those states, as a matter of local procedural preference to attach finality to their criminal proceedings, have clearly announced to both prosecution and defense by decisional or statutory law that a guilty plea terminates further litigation of Fourth Amendment grievances.

New York,[3] however, has chosen to permit appellate review of Fourth Amendment questions even though a plea of guilty is interposed after the motion to suppress is denied, an innovation which has not gone unadmired.

Section 813-c has earned special commendation as a

[3]A New York defendant claiming to be aggrieved by an unconstitutional search and seizure may move for its suppression as evidence (§813-c). Since the determination of this motion will frequently be dispositive of the strength of the case available to both the prosecution and defense, the motion, except in unusual circumstances (§813-d[1]) must be made before trial has commenced; and regardless of the pre-trial determination, the trial judge is bound by it (§813-d[2]). A defendant, however, who makes no motion at all, or whose motion is not made in accord with the applicable provisions, is deemed to have waived any objection, both at trial and on any subsequent appeal, to the admissibility of the evidence he failed to take proper and timely steps to suppress (§813-d[4]). *People v. Friola*, 11 N.Y.2d 157 (1962). The order denying a motion to suppress is an intermediate ruling which will be reviewed if raised on the appeal from the conviciton. See *People v. Gibbs*, 21 A.D. 2d 980 (2d Dept. 1963). These general provisions are fairly representative of the procedural preferences which currently prevail by dint of statute or case law in all jurisdictions, including federal courts. Fed. Rule Crim. Proc. 41(3); *Lawn v. United States*, 355 U.S. 339, 353-54 (1958); *United States v. Clark*, 459 F.2d 977 (8 Cir. 1972).

sound approach to crowded criminal calendars by the American Bar Association's MINIMUM STANDARDS RELATING TO CRIMINAL APPEALS, [Approved Draft, 1970] §1.3(b)(i) and Commentary thereto:

> New York avoids the unfortunate situation where the only reason a defendant goes to trial is to save the right to appeal denial of a pre-trial motion to suppress evidence. Where the only litigable questions arise before trial, it is wasteful to force a sham trial in order not to have a forfeiture of appellate review.

Similar considerations led to the recent adoption of New York's approach as Rule 444(d) of the UNIFORM RULES OF CRIMINAL PROCEDURE [Approved Draft: August, 1974].

While New York was the first (813-c was enacted in 1962) to announce a local procedural preference for the avoidance of unnecessary trials and a concomitant willingness to forego the finality that generally attaches to criminal proceedings following a plea, other states have followed suit. The overall court-economy benefits of allowing post-plea appellate review of pre-trial motions to suppress were not lost on Wisconsin draftsmen; the adoption of W.S.A. §971.31(10) was heralded by that state's Judicial Council for the following stated reason:

> This subsection, based upon N.Y.C.C.P. §813-c, should reduce the number of contested trials since, in many situations, the motion to suppress evidence is really determiantive of the trial. 1970 Wisconsin Annotations, p. 2142

The Proposed Final Draft of the INDIANA CODE OF CRIMINAL PROCEDURE (September, 1972) has simi-

larly chosen to adopt New York's innovative and time-saving procedures [§35-2.1-4-5(2)(e)]; and California has a similar, though not identical, statute [Pen. Code §1538.5(m)].

Finally, the court of appeals (24a) reiterated the observations it had made in 1967, 1968, and 1970, that the statute was a beneficent and enlightened effort to avoid unnecessary trials and accompanying calendar backlogs, observations which subsequently met with the concurrence of the New York Legislature when, in 1971, it saw fit to retain the provision intact [as §710.70(2)][4] as part of an entirely new Criminal Procedure law which otherwise wrought sweeping changes in many areas of the administration of criminal justice.

New York's practice in implementing §813-c amplifies the statutory purpose and defines the plea-related expectations of all who function under its procedures. A New York defendant who, after pleading guilty, appeals the constitutional claim he litigated pursuant to 813-c will seek reversal on the ground that the conviction was predicated upon illegally seized evidence. If the appellate court finds the evidence to have been unconstitutionally seized, the conviction will be reversed. The order reversing the conviction (1) grants the motion to suppress; (2) vacates the plea; and (3) remits the case for further proceedings. See for example *People v. Torres*, 45 A.D.2d 185 (1st Dept. 1974). The appellate disposition upon reversal is based on the assumption, created by §813-c, that the plea was entered because the motion to suppress had previously been denied;[5] no separate or independent claim that the plea was "coerced" need be made in order to secure this three-pronged remedy. Moreover, the conviction will be reversed even though the evidence in question does not relate to the count of the indictment to which the plea was entered. *People v. Lakin*, 21 A.D.2d 902 (2d Dept. 1965). In a contraband case, such as respondent's, the nexus between the plea and the preceding denial of the motion is so obvious, that an appellate order of reversal will not even bother to remand for further proceedings: the charges are dismissed outright. See *People v. Stokes*, 32 N.Y.2d 202 (1973).

[4]While petitioner correctly points out (Pet. Br. 12) that published legislative history does not reveal the precise goals of the legislature, it is unlikely, to say the least, that the observations of the American Bar Association and the repeated laudatory comments of the Second Circuit's earlier cases eluded the drafters; it is similarly implausible that the court-economy benefits of §813-c and its successor were more apparent to the state of Wisconsin than to the drafters of the New York statute Wisconsin expressly chose as its model.

[5]Such were precisely the circumstances of respondent's plea, as the record so clearly indicates (14a). Indeed, the record, as well as the general trial and appellate practice in New York as described above, gives the lie to the fiction proffered by petitioner (Pet. Br. 9) that respondent's conviction "is not based upon an unconstitutional search and seizure" but is based "solely" on the guilty plea. In other constitutional contexts, this Court has not taken kindly to such fictions. See *North Carolina v. Pearce*, 395 U.S. 711, 721 n. 17 (1969). In any event, respondent has never alleged that his plea was involuntary, and petitioner's argument is thus quite beside the point.

In short compass, then, state practice under §813-c confirms the essential function of that statute in plea cases: to secure speedy appellate review of the constitutional issue litigated in timely accord with the statute's other procedural requirements; in such a context, the plea operates largely as a device whereby the constitutional issue can be litigated without resort to trial. Neither the legislature, the judiciary, the prosecution nor the defense expects the guilty plea to terminate further litigation of a properly-litigated pre-plea constitutional claim; in such cases, no one (except the petitioner at bar) entertains any expectation that the plea attaches finality to the constitutional litigation that preceded the plea. Rather, the statute leads a defendant to expect full review of his Fourth Amendment claim.

II.

Most states have procedural rules which reflect substantial distinctions between pleas and trials, with a trial being the exclusive manner in which constitutional claims are to be litigated lest they be forfeited for further review. New York, however, has legislatively chosen to encourage guilty pleas where possible, and, with a view toward obvious court-economy benefits, has dispensed with the formality of trial which other states require as the *sine qua non* for preserving constitutional claims for appellate review.

Undaunted by the existence of §813-c (whose constitutionality petitioner does not contest) and the continuing policy its 1970 reenactment reflects, petitioner advances only one objection to the availability of habeas corpus to respondent: his guilty plea. Petitioner seeks support in the general teaching of the *McMann* line of cases that a guilty plea represents a "break in the chain of events which has preceded it" and waives not only a trial but, "unless applicable law otherwise provides" [*McMann*, at p. 766], also waives the right to contest the admissibility of evidence the state might have used. In New York, however, a guilty plea is not a "break in the chain"; and analysis of *McMann* and its progeny demonstrates that their outcomes have been dictated by state procedural preferences, and the distinctive expectations of finality which flow from them, rather than by the talismanic significance, independent of those preferences, which petitioner seeks to attach to a counselled guilty plea.

In *Tollett v. Henderson* (411 U.S. 258 [1973]), 20 years after pleading guilty the defendant sought to litigate, collaterally and for the first time, the composition of the grand jury that had indicted him. Since state law (*State ex rel. Lawrence v. Henderson*, 433 SW2d 96, 101 [Tenn. Cr. App. 1968]) required such a claim to be raised before trial and the defendant not only failed to raise the claim but had pleaded guilty as well, the state courts ruled that he had thereby "waived" the claim. This Court refused to upset the state's expectation of finality as mirrored in its procedural preference for trial preservation of the claim:

> In order to obtain his release on federal habeas corpus under these circumstances, [the defendant who pleads guilty] must not only establish the unconstitutional discrimination in selection of

> grand jurors. He must also establish that his attorney's advice to plead guilty *without having made inquiry* into the composition of the grand jury rendered that advice outside the range of competence demanded of attorneys in criminal cases.
>
> *Tollett v. Henderson, supra*, 411 U.S. at p. 268 (emphasis added)

The same analysis prevailed in *McMann v. Richardson*, [397 U.S. 757 (1970)], where the defendants had pleaded guilty without any litigation of any issue whatever. Each defendant subsequently applied for, and was denied, state collateral relief on the claim that an unconstitutionally coerced confession preceded his guilty plea. The state denied relief to each on the basis of then governing state law:

> If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea.
>
> *People v. Nicholson*, 11 N.Y.2d 1067, 1068 (1962)

This Court protected the dual state interest—that the confession issue be litigated at a trial if at all, and that it would be unfair to the state to allow the issue to be litigated for the first time long after the plea—from future dilution via federal habeas corpus:

> For the defendant who considers his confession involuntary and hence unusable against him at trial, tendering a plea of guilty would seem a most

> improbable alternative. The sensible course would be to contest his guilty prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however, guilty he may be . . . a guilty plea in such circumstances is nothing less than a refusal to present his federal claims to the state court in the first instance—a choice by the defendant to take the benefits, if any, of a plea of guilty and then to pursue his coerced-confession claim in collateral proceedings. *McMann v. Richardson, supra*, 397 U.S. at p. 768.

Tollett and *McMann*, then, attached no independent significance to the plea in precluding habeas relief to those defendants. Their guilty pleas became relevant, and ultimately dispositive, only within the context of state procedural preferences for (1) trials as the method of litigating and preserving a constitutional issue; and (2) finality of convictions obtained against pleading defendants who, under state law, thereby bypassed the preferred procedure for litigating that claim.[6] In states with those preferences, a guilty plea is the kind of bypass that concretizes the state's expectation of

---

[6] This is the mark missed by petitioner's assertions (Pet. Br. 11) that the Second Circuit has shown special grace to New York pleaders which is at variance with the forfeiture it applies to other pleaders seeking collateral relief, and thus has allowed the New York legislature to "enlarge" federal jurisdiction. There is no variance here at all, and the constant for the availability of collateral relief remains the habeas corpus statute exhaustion requirement and the waiver-deliberate bypass gloss it has acquired. What qualifies a defendant for federal relief is not the *nature* of the procedures the state has erected for the litigation and preservation of federal claims, but the proper and timely *employment* of those procedures.

finality upon which subsequent intrusion by way of habeas corpus is unfair and unjustified. The presence of counsel when the plea is entered lends a presumptive deliberateness to that bypass, and thus all that survives the plea for habeas relief is the competence of counsel's advice as to the forum to which the claim should first have been presented, and the closely related issue of the voluntariness of the plea itself.

Respondent, unlike the defendants in *Tollett* and *McMann*, followed the state procedural preferences of §813-c for litigating his constitutional claim; New York, unlike the states in *McMann* and *Tollett*, has dispensed with its expectation of finality by allowing respondent post-plea appellate review of that claim under §813-c. Thus neither of the interests which this Court protected in *Tollett* and *McMann* call out for protection here. The state's procedural interest of §813-c have already been vindicated by respondent's scrupulous adherence to its requirements. As for the state's finality interests, New York has legislatively abandoned them.[7]

Petitioner's "waiver" argument thus distills itself to the following proposition: a federal habeas "court"

[7] Just last Term, this Court held that a federal habeas corpus court will not protect the state's interest in finalizing a criminal proceeding against a double jeopardy claim, regardless of the state's procedural preference for litigating that issue at trial and regardless of the apparent finality the defendant's guilty plea ostensibly affixed to state proceedings. *Blackledge v. Perry*, ___ U.S. ___ 40 L.Ed.2d 628 (#72-1660). Certain claims, such as the state's constitutional power to try a defendant, survive a plea even though the state, unlike New York, has not legislatively abandoned its finality interests and even though the defendant had bypassed state remedies.

should afford New York's finality interests greater protection than the state legislature, for its own court-economy reasons, deems desirable. Petitioner can offer neither reason nor authority for such a dubious proposition, for Congress has enacted a habeas corpus statute which, by its very terms, requires federal reassessment of properly preserved constitutional claims–a reassessment which both supersedes and is independent of the state's final disposition of that claim. In this regard, we are hard-pressed to improve upon this Court's observation that:

> conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.
>
> *Fay v. Noia, supra*, 372 U.S. at p. 424.

III.

The theoretical weakness of petitioner's "waiver" argument and its misplaced reliance upon *McMann* and *Tollett* is matched by a corresponding callousness to the injustice the argument would work upon respondent. For the record in this case bears grim witness to how an automatic "waiver" conclusion alters an enlightened statutory provision into a trap for the unwary. After respondent's motion to suppress was denied, respondent pleaded guilty to the contraband charge expressly announcing his intention to follow the post-plea procedures of §813-c as the means whereby he would seek to vindicate the constitutional claim he litigated unsuccessfully at the motion to suppress (App. 14a);

even the judge who pronounced sentence recognized the lurking constitutional infirmities of the case and granted a "certificate of reasonable doubt" to stay execution of sentence while post-plea appellate remedies were pursued (App. 16a). Though petitioner ignores the inequitable predicament his "waiver" argument creates for respondent, the court of appeals could not:

> "it would be anomalous if [respondent] by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal simultaneously waived his right to present those same claims to a federal court because he was lulled into following state procedures" [App. 24a]

It is thus disingenuous for petitioner to insinuate (Pet. Br. 12) that the court of appeals, by honoring §813-c in federal court, has sprung a trap on the state legislature. After all, it was the legislature, not respondent, that enacted §813-c upon which respondent and his lawyer explicitly relied[8] as the legitimate

[8] The reliance ingredient is enhanced by another factor. The record shows that respondent's lawyer, like any competent lawyer in New York, knew that a plea did not waive state appellate review of a properly litigated Fourth Amendment claim. Presumably, he knew this simply from having read the text of §813-c which, at that time (May 7, 1970), was set forth in the 1969-1970 pocket-part supplement to McKinney's Code of Criminal procedure, Part 3. The case-law annotations to §813-c included synopses of *United States ex rel. Molloy v. Follette* (391 F.2d 231) and *United States ex rel. Rogers v. Warden* (381 F.2d 209), two Second Circuit cases holding that habeas corpus remedies were not waived by a plea under §813-c. There is no reason to believe that respondent's lawyer, who clearly was aware of §813-c, was not equally aware of these holdings when he counselled the plea.

and proper method for the vindication of the constitutional claim notwithstanding the plea. Petitioner, unlike respondent, does not—and cannot—show any detrimental reliance upon §813-c. Nor can petitioner deny the explicit nexus between the existence of §813-c (which he now seeks to disaffirm) and respondent's plea, which petitioner now contorts into a "waiver" only after it has been secured.

As this Court has pointed out, equitable principles are most germane to habeas corpus proceedings:

> "Habeas corpus has traditionally been regarded as governed by equitable principles. Among them is the principle that a suitor's conduct in relating to the matter at hand may disentitle him to the relief he seeks . . . We therefore hold that the federal habeas judge may in his discretion deny relief to any applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."
>
> *Fay v. Noia, supra*, 372 U.S. at p. 438

It is thus doubly ironic that petitioner relies so heavily on *McMann* and *Tollett*, for those cases were founded on *Fay's* requirement of candor and consistency of position between the defendant and the state.

In those cases, of course, the defendants took the benefits of their guilty pleas (lesser sentences) but deliberately bypassed their opportunities to present their extant federal claims to the state courts through the procedures the state had made available for that purpose. This Court thought it unfair to the state to allow those same defendants to do a complete about-face and raise the previously bypassed federal claims for the first time in collateral proceedings long

after the state had been lulled into accepting their guilty pleas as final dispositions of their cases.

Here, however, the roles have been reversed. It is the respondent who has been lulled into a false sense of security and it is the state that seeks the unfair advantage in federal proceedings. For in the courts of New York the state affixed no post-plea finality whatever to the constitutional claim respondent litigated in timely accord with §813-c, and opened its appellate doors for further litigation of such claims. Only when the claim reached the federal courthouse did the state—with the court-economy benefits of respondent's plea conveniently in hand—announce its change of heart, assert that "plea-equals-waiver", and declare that it had expected the plea to terminate further litigation of the claim. When a state has legislated an equation between a plea and a trial for purposes of litigating a constitutional issue,[9] the spirit of *McMann* and *Tollett* precludes renunciation of that equation for the sole expedient of preventing an otherwise qualified habeas claimant from securing the relief that Congress has mandated. Nothing in this Court's plea cases sanctions the inequitable advantage sought here by petitioner, and the court of appeals was wholly correct in so holding. Cf, *Raley v. Ohio*, 360 U.S.423 (1959).

[9]Analogous situations have occurred on direct appeals from federal convictions where, by stipulation with the U.S. Attorney and the district judge, the defendant pleaded guilty to the charges against him while preserving for appellate review the constitutional issue he litigated before the plea. On appeal, the courts have viewed the arrangements as enforceable plea-promises governed by *Santobello v. New York* (404 U.S. 257 [1972]), have felt duty-bound to honor the stipulation, and thus have considered the merits of the constitutional issues involved notwithstanding the guilty pleas. See, for example, *United States v. Mendoza*, 491 F.2d 534 (5 Cir. 1974) and *United States v. Cox*, 464 F.2d 937 (6 Cir. 1972); *accord*, *United States v. DeCosta*, 435 F.2d 630 (1 Cir. 1970); *United States v. Doyle*, 348 F.2d 715, 719 (2d Cir. 1965) [Friendly, J.]; compare *United States v. Clark*, 459 F.2d 977 (8 Cir. 1972).

IV.

Petitioner closes (Pet. Br. 13) with a suggestion, ungraced by logic, statute, or decisional authority, that a pleading defendant with a properly preserved constitutional claim ought be content with this Court's review under certiorari jurisdiction (28 U.S.C. §1257[3]) The suggestion overlooks both the habeas corpus statute and this Court's Rules, and thus ignores well-engrained distinctions between discretionary and mandatory redetermination of federal constitutional claims.

Rule 19, amplifying the terse jurisdictional grant of §1257(3), emphasizes the discretionary dimensions of certiorari, denials of which are, of course, not adjudications on the merits. *Sheppard v. Ohio*, 353 U.S. 910 (1956); compare *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1960).

Congress, for its part, has refused to relegate an otherwise qualified habeas claimant to this Court's discretionary[10] jurisdiction, has explicitly recognized (in

[10]That the exercise of certiorari discretion can be unpredictable is aptly illustrated by this Court's varied responses to the "certworthiness" of the very issue accepted for review here; review was denied four months earlier to a petitioner raising the identical issue. *Mann v. Smith*, 488 F.2d, 245 (9 Cir. 1973), *cert. den.* 415 U.S. 932 (#73-892). Similar considerations induced this Court to dispense with a certiorari application as a required exhaustion step. *Fay v. Noia*, 372 U.S. 391, 435-437 (1963).

28 U.S.C. §2244[c]) that a certiorari application does not meet the needs of the habeas claimant, and accepts nothing less than an actual adjudication of the merits as a substitute for the federal review mandated by the habeas corpus statute. See *Neil v. Biggers*, 409 U.S. 188, 191 (1972). Finally, the absence of a right to have counsel assigned for the preparation of a certiorari petition [*Ross v. Moffitt*, ___ U.S. ___, 41 L.Ed.2d 341 (#73-786)] further undermines petitioner's equation of a mere attempt to invoke this Court's discretionary jurisdiction with the plenary redetermination of properly preserved federal constitutional claims which Congressional mandate has vested in the district courts.

What is noteworthy about petitioner's certiorari suggestion is that it delivers the conceptual coup-de-grâce to his entire argument, for it necessarily concedes that respondent's guilty plea is not a "waiver" of certiorari prerogatives. It is possible, of course, that the concession stems from this Court's past willingness to review via certiorari the merits of a constitutional claim litigated pursuant to §813-c notwithstanding a guilty plea. *Sibron v. New York*, 392 U.S. 40 45 n.2 (1968); accord, *Parker v. North Carolina*, 397 U.S. 790, 798 (1970).

Whatever its source, petitioner's concession exposes the basic fallacy of automatically equating a guilty plea with a "waiver" of federal review of constitutional claims regardless of the state procedural context of the plea. With respect to constitutional claims litigated pursuant to §813-c, we can see no reason why a guilty plea, conceded both by this Court (*Sibron, supra*) and

by petitioner (Pet. Br. 13) to be irrelevant within the discretionary jurisdictional ambit of certiorari, suddenly becomes a "waiver" within the mandatory jurisdictional ambit of habeas corpus.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STANLEY NEUSTADTER
WILLIAM E. HELLERSTEIN
Attorneys for Respondent

Dated: New York, New York
September 3, 1974